No. 98-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LOS ANGELES POLICE DEPARTMENT,

Petitioner,

vs.

UNITED REPORTING PUBLISHING CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

A unanimous panel of the Ninth Circuit correctly declared unconstitutional Cal. Gov't Code 6254(f)(3), which permits police agencies to allow only selected groups access to public arrest records for government-approved public uses. The Ninth Circuit invalidated Section 6254(f)(3) on the narrow ground that it violates the First Amendment to allow the government to deny access to those who desire to use the information for commercial speech it disfavors. Critically, the district court also recognized that Section 6254(f)(3) allows police departments to censor important commercial speech affecting an arrestee's Sixth Amendment right to obtain competent legal counsel. As the Ninth Circuit found, the public use exceptions to Section 6254(f), including allowing widespread publication, betray its true purpose — to prevent government disapproved solicitation.

The question thus presented is whether the government can selectively allow certain groups of individuals to access public records for government approved purposes, and deny access to others based upon government disapproval of their speech.

STATEMENT PURSUANT TO RULE 29.6

United Reporting Publishing Corporation has no parent or nonwholly owned subsidiary companies (Supreme Court, Rule 29.6).

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United Reporting Publishing Corporation ("United Reporting") respectfully files this brief in opposition to the Los Angeles Police Department's ("LAPD") Petition for a Writ of Certiorari to review the unanimous judgment of the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, section 2(a) of the California Constitution provides in pertinent part:

> Every citizen may freely speak, write and publish his sentiments, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

Cal. Gov't Code 6254(f) provides in pertinent part:

> [S]tate and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation.
>
> (1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is

currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to [confidentiality] restrictions imposed by . . . the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim [of a sex offense crime] defined by . . . the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is a victim of more than one crime, information disclosing that the person is a victim of [a sex offense crime] defined by . . . the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to [confidentiality] restrictions of . . . the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . , except that the address of the victim of [a sex offense crime] defined by . . . the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

STATEMENT OF THE CASE

A. Law Enforcement Agencies Lobbied For The Amendment of Section 6254(f) To Allow Selective Disclosure of Arrestee Addresses.

Before July 1, 1996, the California Public Records Act ("Act") mandated that "state and local law enforcement agencies ***shall*** make public . . . [t]he full name, current address, and occupation of every individual arrested by the agency[.]" Cal. Gov't. Code 6254 (emphasis added). The Act's underlying purpose is to provide maximum public access to information concerning the conduct of the people's business. Cal. Gov't. Code 6250 *et seq*. The preamble declares "that access *is a fundamental and necessary right of every person* in this state." Cal. Gov't. Code § 6250 (emphasis added).

The legislative history supporting Section 6254(f)'s mandatory arrest record disclosure provision reveals the primary impetus behind its passage:

> [I]n recent years an aggressive attitude in reporting crime news has, in some instances, resulted in the closing of all records of police activity in apparent retaliation for critical press accounts in some cities.

County of Los Angeles v. Superior Court, 18 Cal. App. 4th 588, 596-98 (1993). The California Supreme Court agrees with California's Legislature that there is an overriding public interest in notifying the public of arrestees charged with crimes, that trumps arrestee privacy rights. *Loder v. Municipal Court*, 17 Cal. 3d 859, 863 (1976).

In September 1995, however, at the urging of state and local law enforcement agencies and district attorneys' offices, Section 6254(f) was amended to prohibit the release of arrestee *addresses* (their names remain public) to individuals who intend to use the addresses "directly or indirectly" for commercial speech. Pet. App. 21a and n.7. As of July 1, 1996, no person could obtain the address of any individual arrested unless the requester declared under penalty of perjury that the request was made for a "scholarly, journalistic, political, or governmental purpose," or for "investigative purposes" by a licensed private investigator. Cal. Gov't. Code § 6254(f)(3). None of these vague "purposes" were defined, nor did the statute define what it means to "indirectly" sell a product or service.

The official reason for amending Section 6254(f)(3) was to minimize costs. Yet no government studies or evidence support this purpose or explain how any cost savings could occur given that the same information has to be collected for the government-approved purposes. Pet. App. 17a.

United Reporting is a publishing service that provides to its clients the names and addresses of recently arrested individuals, among other information. Pet. App. 11a. United Reporting also publishes the *JAILMAIL Register*, which is distributed to its clients and arrestees. United Reporting's clients are attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and others. *Id.* These entities use the information for many purposes, including sending free literature to arrestees offering legal, drug, and alcohol counseling, cost information, and statutory and regulatory deadlines and other information concerning the crimes charged. *Id.* The *JAILMAIL Register* includes articles on these same topics.

On July 1, 1996, United Reporting was denied access to public records containing addresses of persons arrested by numerous police and sheriff departments statewide. Faced with the reality of being put out of business based on the exercise of its constitutional rights, United Reporting sought declaratory and injunctive relief under 42 U.S.C. § 1983.

B. The District Court Correctly Ruled That Section 6254(f)(3) Is a Content-Based Limitation on Commercial Speech That Violates the First Amendment.

The district court correctly ruled that Section 6254(f)(3) is "a content-based" indirect limitation on commercial speech which implicates the First Amendment. Pet. App. 14a-22a. It invalidated the statute for allowing the government to censor lawful commercial speech, without directly or materially advancing any government interest under a *Central Hudson* analysis. *Id.*, citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In so ruling, the district court noted the possible government discrimination and effect of Section 6254(f) on an arrestee's Sixth Amendment right to obtain competent counsel: "[I]t was state and local law enforcement agencies and district attorneys' offices which proposed this amendment to § 6254." "The statute may . . . have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." Pet. App. 21a and fn. 7. The district court further recognized that arrestees may need immediate legal assistance to prevent them from making self-incriminating statements, to help them obtain bail, and to prepare for any subsequent criminal proceedings. Pet. App. 19a.

In applying the four-part *Central Hudson* test, the district court accepted the parties' agreement that United Reporting's proposed speech is neither illegal nor misleading. Pet. App. 16a. It also found the government's two asserted interests in minimizing costs and protecting the privacy of arrestees to be substantial. The district court concluded, however, that Section 6254(f)(3) failed to satisfy the third and fourth prongs of the test. Pet. App. 17a-22a.

The district court found it doubtful that Section 6254(f)(3) could minimize any costs given that the same information has to be collected and provided to numerous groups for the approved purposes. Pet. App. 17a-22a. Further, increased costs could be charged to commercial users and not infringe speech at all. *Id.*

Likewise, the district court found the purported government interest in protecting arrestee privacy rights was belied by the numerous public uses of the information allowed by Section 6254(f)(3), including widespread publication. Pet. App. 20a-21a. The statute's "exceedingly narrow scope" thus betrayed

its true purpose — to prevent government disapproved solicitation. *Id.*

Relying on *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (in which this Court invalidated permanent bans on attorney direct mail solicitation as violative of First Amendment rights), the district court concluded the free speech "interest so heavily outweighs any concern that arrestees may find such attorney solicitations offensive that the [government's] justification borders on the disingenuous." Pet. App. 19a. In accordance with *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), the district court agreed that arrestees — not the government — should control their own mailboxes, and unwanted direct mail solicitations can be thrown away. *Id.*

C. The Ninth Circuit Unanimously Affirmed the District Court's Ruling.

Notably, the Attorney General of the State of California did not appeal the district court's judgment to the Ninth Circuit. Pet. App. 26a. Before the Ninth Circuit, the LAPD accepted the district court's finding that Section 6254(f)(3) did not minimize costs — the purported reason for adopting the statute.[1] Instead, the LAPD asserted the government's need to protect arrestee privacy by prohibiting direct mail solicitation and reducing opportunities for commercial interests to create criminal history information banks. Pet. App. 32a.

The Ninth Circuit accepted both government interests as substantial under a *Central Hudson* analysis, but ruled that

1. The LAPD had failed to produce any evidence of cost savings to the district court. Pet. App. 18a and 30a.

Section 6254(f)(3) did not advance either interest "in a direct and material way." Pet. App. 31a, relying on *Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1993), and *Edenfield v. Fane*, 507 U.S. 767 (1993). The LAPD failed to provide any evidence that commercial interests would create "unreliable criminal history information banks," and such speculation and conjecture are insufficient to sustain a restriction on commercial speech. *Id.* at 32a, citing *Coors Brewing*, 514 U.S. at 487.

Further, in rejecting the asserted interest in preventing the "direct intrusion into the private lives and homes" of arrestees, the Ninth Circuit agreed with the district court (and this Court) that such privacy is not invaded by the solicitation itself, but by the discovery of the information that led to the solicitation. *Id.* 33a, citing *Shapero*, 486 U.S. at 476 ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].") The Ninth Circuit also agreed that arrestees — not the government — must decide whether unsolicited information is unwanted and should be thrown away. Pet. App. 33a.

The Ninth Circuit likewise agreed that the Tenth Circuit's decision in *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994), is wrongly decided. *Lanphere*, 21 F.3d 1508, fails to take into account this Court's decision in *Edenfield*, 507 U.S. at 767 (holding that the second prong of *Central Hudson* requires the challenged regulation to advance the state interest "in a direct material way," not merely a direct or "reasonably" direct way), and is in conflict with *Coors Brewing*, 514 U.S. 476. Pet. App. 34a. This Court in *Coors Brewing*, 514 U.S. 476, held that an overall irrationality of a government regulatory scheme, including numerous exceptions that undermine the statute's purported

purpose, results in "little chance" that a regulation can directly or materially advance its aim. *Id.* at 489.

The Ninth Circuit held the myriad public uses of arrest records allowed under Section 6254(f)(3) preclude it from directly and materially advancing any purported government interest in protecting arrestee privacy. Pet. App. 34a-35a. The Ninth Circuit concluded that it is simply not rational for a statute which purports to protect the privacy of arrestees to allow the names and addresses to be published "in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes." Pet. App. 35a.

REASONS FOR DENYING THE WRIT

This Court should not waste valuable judicial resources to review the well-reasoned, cogent decision of the Ninth Circuit. The decision is in accordance with decisions from the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits and numerous district courts, and is based on free speech principles long settled by this Court.

There is no meaningful division in the lower courts on the constitutionality of allowing police to release arrest records for selected public purposes, but not for commercial speech (sections A. and B., *infra*). The morass of unrelated statutes cited by the LAPD in an attempt to manufacture a conflict justifying review by this Court are irrelevant to this case (section C., *infra*). The vast majority (78 of 85 statutes) do not concern arrest records that implicate First and Sixth Amendment rights of arrestees. *See* Pet. App. 1a-5a. Further, the constitutionality of most of the statutes has never been tested.

Of the "Police Report Statutes" (Pet. App. 1a-2a) tested, all recent court decisions strike them down as violating the

increased First Amendment protection afforded commercial speech by this Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), *Edenfield*, 507 U.S. 761, and *Coors Brewing*, 514 U.S. 476, among others. Only the Tenth Circuit has upheld such a challenge to an arrest record statute, and *Lanphere*, 21 F.3d 1508, has been soundly criticized. *See* Pet. App. 33a, fn. 4.

This Court has long prohibited governments from adopting statutes that allow them to monitor and control information flowing into private mailboxes. If allowed to survive, the chilling effect of Section 6254(f)(3) and similar statutes would be far-reaching: governments would be allowed to disapprove uses of public information, selectively withhold records from disfavored or weak groups whose speech they dislike, and censor the flow of information to citizens.

Other constitutional infirmities make this case inappropriate for review as well. Section 6254(f)(3) fails to satisfy the fourth prong of the *Central Hudson* test (which the Ninth Circuit did not reach), sweeps within its vague terms speech that is not commercial, and denies equal protection and due process of law. Pet App. 36a.

Further, article I, section 2 of the California Constitution provides even broader speech protections than the First Amendment. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (California provides for broader free speech and forum protection than the First Amendment requires); *Blatty v. New York Times*, 42 Cal. 3d 1033, 1041 (1986) (California's free speech guarantee independently establishes a zone of protection broader than the First Amendment). Given the California Supreme Court's determination that there is an overriding public interest in identifying and notifying the public of arrestees charged with crimes, California's broader free speech guarantee provides an independent basis for invalidating Section 6254(f)(3).

A. The Circuit and District Courts Have Consistently Invalidated Government Imposed Content-Based Restrictions on Commercial Speech.

Regulations that single out a business solely on the basis of the content of the material it may sell or distribute presumptively violate the First Amendment and can be justified, if at all, only by a compelling government interest. *Minneapolis Star v. Minnesota Dept. of Revenue*, 460 U.S. 575 (1983); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (finding a regulation improperly "singled out speech on a particular subject for a financial burden it places on no other speech and no other income"). To justify a content-based restriction, "the State must show that its regulation is necessary to serve a compelling State interest and is narrowly drawn to achieve that end." *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 229-230 (1987). If commercial and non-commercial speech are implicated together, this higher burden must be met as well. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).

The government likewise bears the burden of justifying any restriction on purely commercial speech. *Bolger*, 463 U.S. at 71 n.20 (1983). This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to uphold a restriction on commercial speech must demonstrate the harms the government recites are real and the restriction will in fact directly alleviate them to a material degree. *Edenfield*, 507 U.S. at 768, *Coors Brewing*, 514 U.S. 476. Federal courts will not construe state legislative enactments to create constitutionality. *Virginia v. American Bookseller's Association*, 484 U.S. 383, 397 (1988) ("We will not rewrite a state law to conform to its constitutional requirements.")

Here, the LAPD cites 11 legal challenges to "Police Report Statutes" (including accident report statutes) to support its

contention that a conflict exists in the lower courts over whether the First Amendment allows governments to release selectively police reports for some public purposes, but not for commercial speech. Pet. 7, Pet. App. a1-a2. Only seven of these statutes even arguably concern arrest records.[2] Of those seven, only the Colorado statute has been upheld by the Tenth Circuit in *Lanphere*, 21 F.3d 1508.

Eight of the statutes have been consistently struck down on First Amendment grounds by the Fifth, Ninth, and Eleventh Circuits, and numerous district courts in California, Florida, Georgia, Kentucky, New Mexico, and Texas. *Id. See Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993); *Speer v. Miller*, 15 F.3d 1007 (11 Cir. 1994), *on remand*, 864 F. Supp. 1294 (N.D. Ga. 1994); *United Reporting Publishing Corp. v. California Hgwy Patrol*, 146 F.3d 1133 (9th Cir. 1998), *aff'g*, 946 F. Supp. 822 (S.D. Cal. 1996); *Statewide Detective Agency v. Miller*, No. 96-Civ-1033 (WBH), Order (N.D. Ga. Aug. 12, 1998), *aff'd*, 115 F.3d 904 (11 Cir. 1997); *Babkes v. Satz*, 944 F. Supp. 909 (S.D. Fla. 1996); *Amelkin v. Commissioner Dep't of St. Police*, 936 F. Supp. 428 (W.D. Ky. 1996), *on remand from Amelkin v. McClure*, No. 94-6161, 1996 U.S. App. LEXIS 1414 (6th Cir. Jan. 9, 1996); *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994), *on appeal of separate issue, aff'd in part and rev'd in part*, 63 F.3d 358 (5th Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996); *LaSalle v. Udall*, Civ. A. No. 94-0404-M, Unpublished Opinion and Order (D.N.M. Feb. 16, 1996).[3]

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2. As previously noted, statutes that concern accident or traffic reports do not implicate the First and Sixth Amendment rights of arrestees to receive information concerning the hiring of competent legal counsel.

3. Of the remaining "Police Report Statutes," Oklahoma Statute § 24 A.8 mandates that arrestee records shall be made public. Indiana (Cont'd)

In *Northern Kentucky Chiropractic v. Ramey*, No. 95-5645, 1997 U.S. App. Lexis 1734 (6th Cir. Jan. 29, 1997), and *Amelkin v. McClure*, No. 94-6161, 1996 U.S. App. LEXIS 1414 (6th Cir. Jan 9, 1996), two district courts in the Sixth Circuit also invalidated prohibitions on the commercial use of public records on First Amendment grounds, but the decisions were remanded to comply with notice provisions of Fed. R. Civ. P. 65.

In *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997), the Fourth Circuit also recently affirmed a district court's invalidation of a statute forbidding direct-mail solicitation of criminal and traffic defendants by lawyers within thirty days of arrest. It found that the alleged harm to the profession's image was largely speculative, and could not justify the restriction on the free flow of information to individuals *at a time when such information is critically needed*. *Id.* at 1154-1155.

(Cont'd)
Code § 5-14-3-5 (cited in "Miscellaneous Statutes") likewise requires public disclosure of arrestee information within twenty-four hours of the suspected crime. Arizona Revised Statute § 28-667 (1998), Florida Statutes 316.066 and 327.301 (1998), and Hawaii Revised Statute § 286-172 (1997), concern accident reports, not arrest records, and have never been constitutionally tested. *But see Babkes*, 944 F. Sup. 909, striking down a Florida traffic citation statute on First Amendment grounds. Maryland Code Annotated § 10-616 (1997) applies to numerous types of records, not just arrest records, and has never been constitutionally tested.

Petitioner also erroneously relies on "General Public Record Statutes." Pet. App. 2a. The constitutionality of these statutes has never been tested, and such records do not implicate the overriding public interest in disclosing arrest information to the public or the federal constitutional right to retain competent counsel. Similarly, Petitioner relies on statutes concerning public assistance, elections, employee financial disclosures, trade secrets, and privileged information that simply have no bearing on the arrest records at issue here.

Likewise, in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998), the Seventh Circuit, upon vacation and remand from this Court, affirmed a district court decision striking down an Illinois statute that allowed citizens to opt out of real estate solicitations as an impermissible restriction on commercial speech. In reconsidering its decision in light of *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Seventh Circuit found no evidence of any "solicitation harms" or threats to residential privacy from real estate solicitations, and concluded the restriction did not advance such interests in a direct or material way. *Id.* at 404. It further noted that the state, not homeowners, had made the distinction between real estate and other solicitations without a logical privacy-based reason. After *Discovery Network*, 507 U.S. 410, *44 Liquormart, Inc.*, 517 U.S. 484, and *Coors Brewing*, 514 U.S. 476, the Seventh Circuit concluded that courts can no longer place residential privacy interests above speech restrictions absent some showing that the restriction fits the justification, and that severe underinclusiveness of a statute is fatal.[4] *Id.* at 404-405.

As these cases demonstrate, recent decisions by courts in the Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits consistently invalidate statutes like Section 6254(f)(3) on First Amendment grounds.

4. In *Condon v. Reno*, 155 F.3d 453 (1998), a case cited by the LAPD, the Fourth Circuit questioned whether individuals can ever have a right of privacy in their names and addresses when "pervasive schemes of regulation," like those that pertain to vehicle accident and arrest records, are required to be kept by law.

B. The LAPD Relies On The Aberrant Decision of The Tenth Circuit and Two State Court Decisions to Manufacture A "Conflict," All of Which Predate the Increased Protection Afforded Commercial Speech By This Court.

The LAPD relies on the Tenth Circuit's aberrant decision of *Lanphere*, 21 F.3d 1508, and two state court decisions, to manufacture a "conflict." Pet. 6-11. *Lanphere*, 21 F.3d 1508, must now be viewed as wrongly decided, and contains a strong dissent by the Honorable Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit sitting by designation (*id.* at 1516-1520). *See* Pet. App. 33a-34a, n.4. The Tenth Circuit in *Lanphere* admits that Colorado's statute conditions access to public arrest records upon whether the resulting speech is to be commercial, and is therefore content-based. 21 F.3d at 1511. It further analogizes the statute to a "case of a general law singling out a disfavored group on the basis of speech content." *Id.* at 1514. Nevertheless, the Tenth Circuit inexplicably concludes the statute advances Colorado's interest in "lessening the danger of solicitor abuse and, relatedly, maintaining public confidence in the judicial system" in a "reasonably direct way," sufficient to survive a *Central Hudson* analysis. *Id.* at 1514. The holding of Lanphere ignores this Court's teachings in *Shapero*, 486 U.S. 466 (invalidating a ban designed to cut off solicitation when lesser measures were more appropriate in light of the commercial speech at issue[5]); *Discovery Network*, 507 U.S. 410 (holding unconstitutional a regulation prohibiting street newsracks for commercial handbills while continuing to allow them for other publications as content-based); *Edenfield*, 507

5. Importantly, Section 2721 of Title 18 of the United States Code points out a less speech restrictive alternative to Section 6254(f)(3)'s ban on commercial speech, *i.e.*, procedures that allow arrestees themselves to opt out of any solicitations. *Accord*, Arkansas Code Ann. § 27-14-412 (Michie 1997); Arizona Revised Statutes § 28-452 (1998).

U.S. 761 (holding unconstitutional restrictions that only "reasonably" directly advance a substantial government interest); and *Coors Brewing*, 514 U.S. 476 (holding unconstitutional statutes whose exceptions undermine and counteract the government interest for which the statute is adopted). No other court has followed it.

The LAPD's reliance on two state court decisions that involve accident reports and predate *44 Liquormart, Inc.*, 517 U.S. 484, and *Coors Brewing*, 514 U.S. 476, is equally misplaced. *DeSalvo v. Louisiana*, 624 So. 2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994), treats a ban on commercial use of accident records as a content-neutral time, place and manner restriction in violation of *Regan v. Time*, 468 U.S. 641 (1984) (a content-based regulation can not qualify as a valid time, place, or manner restriction). *Walker v. South Carolina Department of Highways & Public Transportation*, 466 S.E. 2d 346 (1995), treats a ban on commercial use of accident records as a selective denial of access to information rather than a restraint on speech, in direct contradiction of *all* of the above cases.[6]

6. All courts that have addressed statutes similar to section 6254(f) conclude that a First Amendment challenge is appropriate where a state conditions access to public records on the use to be made of the records. *Babkes v. Satz*, 944 F. Supp. at 911 (by restricting the use to which public arrest information can be put, the statute implicates the First Amendment's protection of commercial speech); *Speer v. Miller*, 15 F.3d at 1010; *Speer v. Miller*, 864 F. Supp. at 1296; *Lanphere*, 21 F.3d at 1513; *Moore v. Morales*, 843 F. Supp. 1124; *Innovative Database Systems v. Morales*, 990 F.2d 217; *Lavalle v. Udall*, No. 94-0404 (D.N.M. 1996); *Amelkin v. Cox*, 936 F. Supp. 428 (W.D. Ky. 1996).

C. Exceptions To Statutes That Undermine Their Purpose, Like Those In Section 6254(f)(3), Can Not Survive First Amendment Scrutiny.

The LAPD's further contention that the "conflict" extends to such cases as *Valley Broadcasting Co. v. United States*, 107 F. 3d 1328, *cert. denied*, 118 S. Ct. 1050 (1998) (invalidating a federal ban on casino gambling because the statute permits other forms of gaming advertisements) and *Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334, *pet. for cert. pending*, No. 98-387 (Sept. 2, 1998) (opposite holding), is meritless. This Court has already held in *Coors Brewing*, 514 U.S. 476, that statutes containing exceptions to bans on publication of information that undermine their purpose can not materially advance the purpose of the statute under the *Central Hudson* test. *Valley Broadcasting*, 107 F.3d 1328, expressly follows *Coors Brewing*, 514 U.S. 476, and *Edenfield*, 507 U.S. 761. *Greater New Orleans Broadcasting Ass'n*, 149 F.3d 334, does not.[7]

The conflicting decisions on election statutes are equally inapplicable to Section 6254(f)(3) which implicates both First and Sixth Amendment rights of arrestees. Pet. App. 12. As the District of Columbia Circuit noted, election statutes contain valuable information collected by *private* political committees that would not be public absent government compelled disclosure for limited purposes. *FEC v. International Funding Institute*, 969 F.2d 1110, 1114-1116 (D.C. Cir.), *cert. denied*, 506 U.S. 1001 (1992). Moreover, this case is closer to *FEC v.*

7. Even dissenting Justice Politz recognized in *Greater New Orleans Broadcasting Ass'n. v. United States*, 69 F.3d 1296, 1304 (5th Cir. 1995), that the gambling ban is "so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest." This Court remanded the majority's decision for reconsideration in light of *44 Liquormart*, 517 U.S. 484.

Political Contributions Data, 943 F.2d 190 (2d Cir. 1991), in which the Second Circuit construed the Federal Election Commission Act (2 U.S.C. §§ 437 *et seq.*) to protect a commercial publication listing campaign contributors to avoid First Amendment violations. United Reporting's *JAILMAIL Register*, like the publication at issue in *FEC*, 943 F.2d 190, is akin to an informational pamphlet, and United Reporting is likewise not engaged in solicitation of arrestees for legal services.

D. The Unanimous Decision of the Ninth Circuit and The District Court is Correctly Decided.

The unanimous decision of the Ninth Circuit, affirming the district court, is correctly decided and consistent with all recent court decisions invalidating similar statutes (*see* sections A. through C., *supra*). It is not contrary to this Court's First Amendment precedents, nor did the Ninth Circuit treat Section 6254(f)(3) as a complete prohibition on United Reporting's speech, as the LAPD contends. Pet. 13-14. The Ninth Circuit treated Section 6254(f)(3) as the content-based, discriminatory restriction that it is.

1. *Arrest Records Are Public in California Pursuant to the California Public Records Act, And Are Protected By The First Amendment and Article I, Section 2 of the California Constitution As Well.*

The LAPD's contention that arrest records need not be made public in California at all, and that restrictions on releasing government records do not violate the First Amendment, is wrong. California's Legislature and its Supreme Court have rejected the police's ability to keep arrest records secret. *County of Los Angeles*, 18 Cal. App. 4th at 596-598 (public disclosure is based on the fundamental need of the public (not just the press) to monitor police and criminal activity); *Loder*, 17 Cal. 3d at 863.

Moreover, access to information concerning the functioning of government receives strong constitutional protection under the First Amendment and article I, section 2 of the California Constitution. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (First Amendment goes beyond protection of self-expression to prohibit government from limiting the stock of information from which the public may draw; it also protects the right to receive information); *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 and n.4 (1992) (same under California Constitution). Beginning in 1980, this Court made clear that the First Amendment prevents denials of access to public information necessary to an informed democracy absent a more compelling interest.[8] *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). This protection has been increasingly extended to afford access to criminal justice records[9] and non-judicial, arrest records.[10]

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8. Dissenting Judge Caldisert in *Lanphere*, 21 F.3d 1508, found that access to judicial and law enforcement records is a compelling interest that cannot be overridden by concerns of preserving the integrity of law enforcement. *Id.* at 1519. It would be "disingenuous," he stated, to recognize as a compelling interest an indirect speech regulation that could not lawfully be allowed as a direct regulation. *Id.*

9. *See United States v. Hubbard*, 650 F.2d 293, 315 (D.D.C. 1980) (access to government records is important to the overriding concern with preserving the integrity of law enforcement and the judicial processes); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (common law right to inspect and copy judicial records); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (lst Cir. 1989) (First Amendment right of access to records of criminal cases); *Oregonian Publishing Co. v. U.S. Dist. Court for Dist. of Or.*, 920 F.2d 1462, 1465 (9th Cir. 1990); *Seattle Times v. U.S. Dist. Court for W.D. of Wash.*, 845 F.2d 1513, 1515 (9th Cir. 1988); *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983).

10. *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991) (campus police arrest and incident reports); *Caledonian-*
(Cont'd)

Under the California Public Records Act as well, access to public records cannot be denied unless allowing access would undermine individual rights, is demonstrably injurious to the public good, and is sufficiently substantial enough to override the fundamental right of access. *See, e.g., Craemer v. Superior Court*, 265 Cal. App. 2d 216, 222 (1968). Further, the Act requires that if a record is public, "*all* persons have [a fundamental right of] access thereto. . . ." *Los Angeles Police Dept. v. Superior Court*, 65 Cal. App. 3d 661, 668 (1977), emphasis in original and citations omitted.

Under Section 6254(f)(3), arrestee addresses are public, except to a targeted group whom the California Peace Officers Association feels are unfairly "profiting from the misfortunes" of others. This group is excluded purely because of government disapproval of commercial speech (as all courts deciding such cases have found). Pet. App. 33a, and cases in fn. 5, *supra* (use of public information cannot be punished under the guise of access). Such discrimination cannot be constitutionally sanctioned under either the First Amendment or article I, section 2 of the California Constitution. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (government discrimination against private speech based on its message is constitutionally intolerable; it is axiomatic that government may not regulate speech based on its substantive content).

The LAPD's reliance on decisions that predate the First Amendment right of access underscored by this Court in 1980

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Record Publishing Co. v. Walton, 573 A.2d 296, 299 (Vt. 1990) (statutory public access to arrest records is "intended to mirror the constitutional right of access"); *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994), (Caldisert, dissenting) (access to arrest records plays a significant positive role in the actual functioning of the judicial process, and a qualified First Amendment right of access should attach).

and are irrelevant is misplaced. *Houchins v. KQED*, 438 U.S. 1 (1978), involved a denial of access to non-public prisons due to security and other penological risks associated with incarcerated inmates. *Nixon v. Warner Communications*, 435 U.S. 589 (1978), concerned tapes governed by the Presidential Recordings and Materials Preservation Act (44 U.S.C.S. § 2107) played as trial evidence. The Act provided for a legislative means of public access to the preserved tapes, and there was no claim that the press was precluded from listening to the tapes and publishing their content as it saw fit. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), addressed not public information, but private information compelled through civil discovery procedures. *Zemel v. Rusk*, 381 U.S. 1 (1965), concerned the Passport Act of 1926, and the right to travel to Cuba when diplomatic relations had been broken off.

2. *As a Content-Based Restriction On Commercial Speech, Section 6254(f)(3) Violates the First Amendment.*

For more than two decades, this Court has underscored that "commercial messages play a central role in public life," and has developed law to insure that consumers have access to accurate information about the availability of goods and services. *44 Liquormart*, 116 S. Ct. 1495; *Coors Brewing*, 514 U.S. 476; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (private economic decisions must be intelligent and well informed; to this end, the free flow of commercial information is indispensable). This Court has rejected paternalistic assumptions that the public will use truthful commercial information unwisely, and has found that people will perceive their own best interests if well enough informed. *44 Liquormart*, 134 L. Ed. 2d at 770 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely

available, that the First Amendment makes for us.") It has warned that government bans targeting truthful commercial messages rarely protect consumers from harm, and are rarely upheld because they often serve only to obscure an underlying governmental policy that could be implemented without regulating speech. *44 Liquormart*, 134 L. Ed. 2d at 728. For this reason, for more than 20 years this Court has invalidated bans on direct mail solicitation by lawyers and other professionals for the public good.[11] *Shapero*, 486 U.S. at 476.

Similarly, as a content-based restriction on commercial speech, Section 6254(f)(3) can not survive the third prong of the *Central Hudson* test. Pet. App. 33a-36a. The Ninth Circuit correctly found the myriad public uses of arrest records allowed under Section 6254(f)(3) preclude it from directly and materially advancing any purported government interest in protecting arrestee privacy.[12] Pet. App. 34a-35a. Further,

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11. *Accord, Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising may not be subject to blanket suppression); *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985) (attorney advertising protected); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990); (same); *Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136 (1994) (same). *Cf. Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), wherein the Court found that a 30-day ban on direct mail solicitations was no more than a *short temporal ban* and would provide reasonable protection for *accident victims* from the detrimental effects of solicitation letters. Section 6254(f)(3) is *not a temporal ban*, and concerns arrestees who are charged with crimes, facing short statutory deadlines, and are constitutionally guaranteed the right to competent counsel.

12. Further, Section 6254(f)(3) is not only arbitrarily chilling speech and the right to receive information, but is invading United Reporting's privacy by requiring it to declare under penalty of perjury, in advance of publication, for government approval, what the use of the information will be.

California's Supreme Court and its Legislature have determined that there is an overriding public interest in allowing citizens to identify who in their communities has been arrested, and for what crimes, that trumps arrestee privacy rights. *Loder*, 17 Cal. 3d 859; *County of Los Angeles*, 18 Cal. App. 4th at 596-598. Complete and accurate identification of arrestees can only occur by making addresses available.

Thus, the unconstitutional government paternalism in controlling arrestees' private mailboxes allowed by Section 6254(f)(3) cannot survive constitutional scrutiny under any analysis.[13] Moreover, alternatives (such as opt out provisions) exist that do not restrict speech.

E. Section 6254(f)(3) Also Violates the First and Fourteenth Amendments on Grounds Not Reached By the Ninth Circuit.

Section 6254(f)(3) also operates as a forbidden prior restraint on speech. Government systems which require permission to speak are prior restraints. *Cantwell v. Connecticut*, 310 U.S. 296, 301-02 (1940) (a statute that proscribes solicitation for specific purposes unless approved by the government is a prior restraint on speech). Under section 6254(f)(3), United Reporting can arguably obtain lawful access to arrestee addresses under the "journalistic" purpose,

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13. Section 6254(f)(3) also fails the remaining prong of the *Central Hudson* test as the District Court found. Pet. App. 22a. For the same reasons, it is a "substantially excessive" burden on protected speech, and disregards more precise means of achieving the asserted cost or privacy goals. *Board of Trustees v. Fox*, 492 U.S. 469, 470 (1989) (this prong requires the government to prove its goal is substantial and the cost carefully calculated); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (even legitimate and substantial purposes are trumped when less drastic means for achieving the same basic purpose are available).

but is restrained from engaging in truthful speech associated with commercial solicitation by the threat of criminal prosecution.

Further, Section 6254(f)(3) contains no judicial safeguards for challenging the government's decision. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988) (government may not condition speech upon obtaining permission from a government official in that official's boundless discretion). Instead, the government can directly prosecute any person it decides used arrestee addresses for a purpose that is not "scholarly, journalistic, political, or governmental" or "for investigation," or to "directly or indirectly" "sell a product or service," despite the vagueness of these undefined terms.[14] Section 6254(f)(3) is equally unconstitutional on vagueness grounds. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

Section 6254(f)(3) is also unconstitutionally overbroad in that it sweeps within its reach non-commercial speech that might "indirectly" relate to the selling of a product or service, including United Reporting's *JAILMAIL Register*. It is underinclusive as well in that it restricts publication by United

14. As United Reporting demonstrated to the Ninth Circuit and district court, it is unsure if its publications fall within the journalist exception to Section 6254(f)(3). A wrong guess arguably subjects United Reporting's owner and others to criminal prosecution, and chills substantial speech in violation of the First Amendment.

Further, similar to a newspaper, United Reporting has no control over how its recipients or clients use the information it publishes, or whether it will be used for a commercial purpose. United Reporting and its representatives cannot know whether signing the required declaration will place them in peril of being prosecuted for perjury for "indirectly" engaging in commercial speech. Because of its vagueness and uncertainty, Section 6254(f)(3) denies due process of law. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961).

Reporting, but not other businesses which access, publish and profit from the same information. Section 6254(f)(3) draws an unconstitutional line to differentiate access that violates United Reporting's equal protection rights. *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982); *Special Programs, Inc. v. Courtier*, 923 F. Supp. 851, 857 (E.D. Va. 1996) (a statute's infringement need not violate the First Amendment directly; its differential effect upon various speakers can in and of itself violate the Equal Protection Clause).

CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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